STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 27, 2013
v	No. 306032 Ionia Circuit Court
JUSTIN DEWAYNE STEPHENS, Defendant-Appellant.	LC No. 2010-014917-FC

Before: BORRELLO, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree murder based on both a premeditation theory and also a felony murder theory, MCL 750.316(1); and second-degree home invasion, MCL 750.110a(3). He was sentenced to life imprisonment for first-degree murder and to 8 to 15 years' imprisonment for second-degree home invasion. The trial court also ordered that defendant pay a $130 crime victim rights fee. Defendant appeals as of right. For the reasons set forth in this opinion we affirm the convictions of defendant and remand for resentencing pursuant to the dictates of *Miller v Alabama*, __ US __, __; 132 S Ct 2455, 2475, 183 L Ed 2d 407 (2012).

This case arises from the victim's son finding his mother's body at her home on December 1, 2006. At the time of the discovery, the victim was found in a pool of blood near a broken Santa Clause statue, a broken mirror which was parallel to a hole in the drywall. The victim's son found his mother's purse without any money. He testified at trial that the victim always had money in her purse and kept her house immaculate.

The Ionia County Sheriff's Department immediately began an investigation. They found cut wounds on the victim's neck and collected pieces of the broken Santa Clause and removed them from the scene. After observing the scene, Sergeant Kevin Ingram of the Ionia County

Sheriff's Department, along with his Lieutenant concluded that the victim died as a result of an accident.[1]

After The Ionia County Sheriff Department concluded the death as accidental, a crew arrived to clean the scene of the victim's death. During their cleaning, they found earrings lying on the floor where the victim had died. One of the earrings had a bent post, indicating to the members of the cleaning crew that it had not fallen out of the victim's ear. They also found a statue or a piece of a broken statue in the middle of the victim's living room. The pieces of glass and the mirror were preserved by the cleaning crew and bagged.

Defendant, who had moved to Texas, lived with the Kramer family who he had met in Texas. Defendant dated Jessica Broom, who also lived with the Kramer family. The Kramer family lived across the street from the victim, which led police to question him and other members of the Kramer household. Despite having concluded the death "accidental," in December of 2006 and January of 2007, Ingram spoke with defendant four times.

In January of 2007 the Michigan State Police were asked to participate in the investigation surrounding the victim's death. MSP Sergeant Michael Morey disagreed with Banner's conclusion that the victim's death was an accident and had the body exhumed and a second autopsy performed. The second autopsy was performed by Dr. Stephen Cohle, a forensic pathologist.

Cohle determined that the victim had two types of injuries: blunt force injuries and sharp force injuries. Cohle also explained that the victim had four "sharp force injuries" along her jaw extending to her neck. Each of the victim's wounds was made by an object entering her at approximately the same angle, which Cohle described as "stab wounds," typically caused by a knife. Additionally, Cohle not only concluded that the wounds were stab wounds but also that the wounds were not consistent with the victim falling into a mirror. Accordingly, Cohle's report concluded that the cause of the victim's death was stab wounds to her face and neck and that the manner of her death was homicide.[2]

In December 2006, Dena Caya, defendant's aunt, sent a bus ticket to defendant so that he could return to Texas. Defendant brought with him a knife, which Caya cleaned with hydrogen peroxide, and a bloody sweatshirt, which she washed approximately 12 times while defendant lived with her. Defendant stayed with Caya for five to seven weeks during which defendant had a serious argument with Caya and locked her in a bathroom and threatened to hurt her "like an old lady." There was another argument in a car where defendant again threatened to harm Caya "like an old lady."

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[1] Dr. James Banner, a medical examiner for Ionia County, performed the autopsy and in his initial report concluded that the victim's death was accidental. He based that conclusion on the fact the victim was found next to a stepstool and a shattered mirror.

[2] In February 2007, after consulting with Cohle, Banner changed his report to an "inconclusive" finding.

In July 2009, Morey traveled to Texas to interview defendant. At first, defendant agreed to talk with Morey. However, 15 to 20 minutes into the interview, defendant ended the conversation. Then, in the spring of 2010, Morey contacted James Holland, a Texas Ranger, to assist in the investigation. On May 6, 2010, Holland interviewed defendant for the first time. Defendant was cooperative, and initially denied killing the victim. Holland probed defendant's alibis for several hours. At the end of that time, Holland told defendant that he believed that defendant murdered the victim based on inconsistencies in defendant's statements. Defendant broke down, started crying, and indicated that "he had done it." Defendant then agreed to provide Holland with a report of exactly what happened. However, defendant insisted on calling his sister Destiny first and she told him not to talk to the police. After the telephone conversation, defendant's demeanor changed and he refused to make a full confession.

Holland interviewed defendant a second time in July 2010. During the interview, Holland wrote the word "others" on a piece of paper, shoved it toward defendant, and told him that "you're not gonna (sic) get it until you understand that it's not about you. It's about others. It's about who you affected; the family, the victim, everyone who knew her." This caused defendant to break down and start crying. Holland worked with defendant to elicit details of what happened, starting with hypothetical's, moving toward what actually happened. Eventually, defendant confessed. Holland described what defendant told him as follows:

> [h]e gave me details in that he said you know he killed her, and he told me the story, which was basically he had broken into the house. The side door was open. He knew the lady. I guess he'd been over there twice before and figured that she had some money.[3] He was despondent because he thought his girlfriend was pregnant. He wanted to go back to Texas. He had all these major life issues going on. But he broke into the side door of the house and he was in there going through the drawers and he found a purse. And in the purse he found I believe he said five $20.00 bills. So he takes it and he puts it in his pocket. Everything's quiet and he's still going through the house and he said all of a sudden he hears what are you doing here or what are you doing. And he turns around and Mrs. Cunningham is standing in the doorway. And he said he looked and he was shocked. He didn't know what to do. He stood up and he basically walked by her. He said he was basically acting like she wasn't there and he was going to walk by her. He said as he did this she grabbed him and basically carried him towards the dining room table by a shirt sleeve and set him down. While this was going on she was saying what are you doing, why are you doing this? And he said he didn't say anything. He just basically did what she did. She directed him to the table. He sat down at the table. She said I'm gonna (sic) call the police. At that point in time he said he just couldn't do that. He couldn't have that happen.

[3] Defendant also gave a recorded confession. In the recorded confession, defendant states "I remember going toward the door but I don't remember what I did." Within defendant's recorded confession to Holland, he admitted that he went to the victim's house to steal money or items of value. Defendant's recorded confession was admitted by the trial court and played for the jurors.

> And he said he stood up and he started walking out. He said she grabbed him by the arm and he said he grabbed whatever was on a shelf. I don't know that [he] ever articulated what it was, but he grabbed whatever was on the shelf and he hit her with it; hit her in the head with it. She fell, stumbled, did whatever [sic] said that she started going towards the door. As she was going towards the door, [defendant] realized that this couldn't happen. He tackled her. He said he thinks he may have stabbed her. He said the next thing he knows he's outside covered in blood behind the house.

After the second interview, defendant used Holland's cellular telephone to call his sister Destiny. Defendant told Destiny that he "killed the old lady" and that "he did it because she knew who I was and he didn't want to go to jail."

The prosecutor introduced additional evidence at trial from defendant's friends that shortly after the victim's death defendant had more money that they had ever known him to possess. Additionally, the prosecutor called Destiny to testify that in July 2010 defendant told her that he killed someone. Destiny testified that defendant told her that:

> he went into a lady's house and—to get money for food and cigarettes, and that he took money out of her drawer, and when he turned around and walked—tried to walk out the door she was standing in the door. And she put her hand on his shoulder and took him to the kitchen and—and set him down, and then she . . . went to call the police and he tried to get up, and she told him to set [sic] down, and he picked up something and he hit her in the head with it. And he said she got up and ran, and he said he ran after her, but he said he doesn't remember after that. But he guessed he killed her, is what—that's what he said.

Defendant told Destiny that he ran after the victim "[b]ecause she got up and ran towards to the door." Destiny then asked defendant why he killed the victim and defendant said "[b]ecause she knew who I was and she could identify [me]." Defendant did not call any witnesses in his defense.

As stated above, the jury found defendant guilty of first-degree murder based both on a premeditation theory and also a felony murder theory, and second-degree home invasion. The trial court sentenced defendant to life imprisonment for first-degree murder and to 8 to 15 years' imprisonment for second-degree home invasion. The trial court also ordered that defendant pay a $130 crime victim rights fee.

In his appeal, defendant argues that Texas Ranger James Holland improperly commented on defendant's credibility and guilt while testifying at trial, and that defense counsel was ineffective because he failed to object to those improper comments. The questions presented by a claim of ineffective assistance of counsel are mixed questions of law and fact; findings of fact by the lower court, if any, are reviewed for clear error, and questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). However, our review of defendant's unpreserved ineffective assistance claim is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, a defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To show prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Toma*, 462 Mich at 302-303, citing *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Under MRE 701,

> [i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Accordingly, a police officer may generally testify regarding his opinions or inferences based on his rational perceptions. See *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898, 904 (1988), mod on other grounds 433 Mich 862 (1989) (holding that, under MRE 701, a police officer may provide an opinion that dents in a car's body could have been caused by bullets). However, "[i]t is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Also, a witness may not express an opinion regarding a defendant's guilt. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

Defendant challenges a series of statements Holland made during his testimony about his two interviews with defendant and defendant's recorded confession. After reviewing the record, we find that five of those statements were proper opinions under MRE 701 because they appear to have been based on Holland's rational perceptions of defendant during his interviews with defendant and they were helpful to provide a clear understanding of Holland's testimony. Also, those five statements did not provide Holland's opinion of defendant's credibility or guilt. *Id*; *Dobek*, 274 Mich App at 71. Defense counsel was not ineffective for not raising meritless objections to those statements. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

However, Holland also described defendant's expression of emotion during his recorded confession as "cunning" and "tactical." And, Holland called defendant's statement within the recorded confession—that he could not remember killing the victim—a "convenient" blackout. These comments on defendant's credibility were improper. *Dobek*, 274 Mich App at 71. Additionally, Holland twice described the circumstantial case against defendant as "beautiful." These two statements impermissibly expressed Holland's opinion regarding defendant's guilt. *Buckey*, 424 Mich at 17.

We agree that if defense counsel had objected to the improper statements set forth above, defendant would have been entitled to a curative instruction. However, a defense counsel's decision not to object to objectionable testimony may be a matter of trial strategy. *People v*

Rodgers, 248 Mich App 702, 715; 645 NW2d 294 (2001). To establish that counsel was ineffective, a defendant must overcome the strong presumption of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Defense counsel has wide discretion in matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

In this case, on cross-examination, defense counsel elicited an admission from Holland that defendant did not specifically state in his recorded confession that he killed the victim. Defense counsel also suggested that defendant's refusal to give a recorded confession at the end of the first interview "irritated" Holland. Defense counsel further elicited statements from Holland that he believed that defendant was guilty after the first interview and after the first interview Holland resolved that "I'm not going to make the same mistakes that I made the first time." During closing arguments, defense counsel again attacked Holland's credibility by noting that the only time defendant said that he tackled the victim and stabbed her was during his second interview with Holland, which was not recorded. Defense counsel also suggested that Holland made assumptions while interviewing defendant.

On this record, it appears that it was defense counsel's strategy to undermine the credibility of Holland's testimony, rather than challenge the admissibility of Holland's statements. In particular, Holland's admissions on cross-examination that he believed that defendant was guilty and that he was determined to succeed in obtaining a recorded confession during the second interview, combined with his repeated statements that there was a "beautiful" circumstantial case against defendant, portrayed Holland as a biased investigator and a biased witness. Based on the record, defendant fails to overcome the strong presumption of sound trial strategy in defense counsel's decision not to object to Holland's objectionable statements. *Carbin*, 463 Mich at 600.

Even assuming that trial counsel's failure to object fell below an objective standard of reasonableness, on the record before us, we cannot find that defendant can show prejudice such that he is entitled to relief based on his claim of ineffective assistance of counsel. *Toma*, 462 Mich at 302-303. The elements of first-degree murder based on a premeditation theory are: "(1) the intentional killing of a human (2) with premeditation and deliberation." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). Generally, "[t]o premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem." *People v Plummer*, 229 Mich App 293, 300; 581 NW2d 753 (1998) (quotation omitted). While there is no specific time requirement for premeditation, "sufficient time must have elapsed to allow the defendant to take a 'second look.'" *Id*. "Premeditation and deliberation may be inferred from all the facts and circumstances" in the record. *Id*. at 301.

In this case, defendant admitted in his confession to Holland during the second interview and also in his recorded confession that after the victim tried to detain him in her home, he hit her in the head with an object. This placed defendant at the scene of the victim's death. Defendant told Holland during his second interview that he tackled the victim as she moved toward her door and that he thought "he may have stabbed her." While defendant stated in his recorded confession that after the victim moved toward to the door, "I remember going toward

the door but I don't remember what I did," his own statements after the murder negated his claim. Holland testified that after the second interview, defendant called Destiny and told her that "[h]e killed the old lady" because "she knew who I was and he didn't want to go to jail." Destiny testified that defendant called her after the second interview and told her that he did not remember what happened after the victim started to run away from him. However, when Destiny asked defendant why he killed the victim, defendant said "[b]ecause she knew who I was and she could identify [me]." While defendant argues that if Holland had not undermined his credibility, the jurors may have believed that he blacked out before the victim was killed and that he acted impulsively and without the required intent, the record does not support this claim.

Additionally, testimony revealed that the victim died from four stab wounds of the type typically caused by a knife along her jaw extending to her neck and that defendant always carried a pocketknife with him. Three of the wounds extended up to two inches into the victim's neck. Defendant's premeditation and deliberation may also be inferred from the fact that the victim died from four stab wounds to her neck. *Plummer*, 229 Mich App at 300. Accordingly, the record overwhelmingly supports that defendant was guilty of first-degree murder where he intentionally killed the victim. And, based on defendant's confession, he first hit the victim in the head with an object before the victim was stabbed. Thus, defendant had sufficient time to take a "second look." Defendant has failed to demonstrate that there was a reasonable probability that the result of defendant's trial would have been different without Holland's improper statements. *Toma*, 462 Mich at 302-303.[4]

Defendant also challenges the trial court's admission of the challenged portions of Holland's testimony, and we agree that the admission of Holland's improper statements was plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). However, for the reasons previously stated, defendant cannot show that the admission of Holland's improper statements affected the outcome of defendant's trial where the evidence supporting defendant's convictions was substantial and the improper comments minimal when considered in the context of the entire trial. *Id*.

Defendant also argues that the trial courts' imposition of the $130 crime victim rights assessment violated the Michigan and federal constitutional prohibitions on ex post facto laws. Unpreserved constitutional issues are reviewed for plain error. *Id*. at 763-764. Both the United States Constitution and the Michigan Constitution prohibit ex post facto laws. US Const, art 1, § 10; Const 1963, art 1, § 1. Michigan's prohibition on ex post facto laws is not more expansive than its federal counterpart. *People v Callon*, 256 Mich App 312, 317; 662 NW2d 501 (2003). "All ex post facto laws share two elements: (1) they attach legal consequences to acts before their effective date, and (2) they work to the disadvantage of the defendant." *Id*. at 318. "A statute disadvantages an offender if (1) it makes punishable that which was not, (2) it makes an

[4] Alternatively, we also find that there was strong evidence that defendant committed first-degree murder under a felony-murder theory. *People v Smith*, 478 Mich 292, 318-319; 733 NW2d 351 (2007).

act a more serious offense, (3) it increases a punishment, or (4) it allows the prosecutor to convict on less evidence." *People v Slocum*, 213 Mich App 239, 243; 539 NW2d 572 (1995).

Here, MCL 780.905 currently provides that:

> (1) The court shall order each person charged with an offense that is a felony, misdemeanor, or ordinance violation that is resolved by conviction, assignment of the defendant to youthful trainee status, a delayed sentence or deferred entry of judgment of guilt, or in another way that is not an acquittal or unconditional dismissal, to pay an assessment as follows:
>
> (a) If the offense is a felony, $130.00.

The crime victim rights assessment found in MCL 780.905(1) is specifically authorized by the Michigan Constitution. Const 1963, art 1, § 24(3) ("[t]he legislature may provide for an assessment against convicted defendants to pay for crime victims' rights"). At the time defendant committed his felony offenses, the crime victim rights assessment under MCL 780.905 as amended by 2005 PA 315 was $60. 2010 PA 281 amended MCL 780.905, effective December 16, 2010, increasing the crime victim rights assessment to $130 where a defendant is convicted of a felony offense. Defendant argues that the trial court's application of the $130 crime victim rights assessment constituted a retroactive increase in punishment, and thus was prohibited by the ex post facto clauses. However, we addressed the same issue in *People v Earl*, 297 Mich App 104; 822 NW2d 271 (2012), lv gtd ___ Mich ___ (Docket No. 145677, entered March 20, 2013). In *Earl*, we held that the imposition of the increased assessment under 2010 PA 281 to offenses committed before that law's effective date "is not a violation of the ex post facto constitutional clauses." *Id*. at 114. *Earl*'s holding is binding under MCR 7.215(C)(2) and (J)(1). Accordingly, the trial court did not err in imposing the $130 crime victim rights assessment on defendant. *Carines*, 460 Mich at 763-764. While defendant argues that *Earl* was wrongly decided and urges this Court to take steps to bring the case before a conflict panel, MCR 7.215(J)(2), considering the case is currently before our Supreme Court, we find his arguments unpersuasive.

The day following oral argument in this matter, defendant, through appellate counsel, filed a motion for immediate consideration asking this Court to resentence defendant. In his motion and brief, defendant asserts that at the time of the offense, defendant was 17 years old. He further admits that at the time of sentencing the issue of defendant's age relative to his sentence of mandatory life without parole was not raised. According, under *Carines*, 460 Mich at 763, we review this issue for plain error.

Unlike in *People v Carp*, 298 Mich App 472; 828 NW2d 685 (2012), defendant's case was pending on direct appeal following release of the United States Supreme Court's decision in *Miller v Alabama*, __ US __, __ (2012). Additionally, pursuant to this Court's decision in *People v Eliason*, ___ Mich Ap ___; ___ NW2d ___; (Docket No. 302353, April 4, 2013) slip op p 9, *Miller* applies and defendant is entitled to be resentenced.

Contrary to some of the assertions made by defendant in his supplemental pleadings, pursuant to *Eliason*, " . . . the only discretion afforded to the trial court in light of our first-degree

murder statutes and *Miller* is whether to impose a penalty of life imprisonment without the possibility of parole." Slip op p 9. In *Eliason*, this Court went on to state:

> In deciding whether to impose a life sentence with or without the possibility of parole, the trial court is to be guided by the following non-exclusive list of factors:
>
> (a) the character and record of the individual offender [and] the circumstances of the offense, (b) the chronological age of the minor, (c) the background and mental and emotional development of a youthful defendant, (d) the family and home environment, (e) the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected [the juvenile], (f) whether the juvenile might have been charged and convicted of a lesser offense if not for incompetencies associated with youth and (g) the potential for rehabilitation. [Citing *Carp*, 298 Mich App at 532, citing *Miller*, 132 S Ct at 2467-2468 (quotation marks and citations omitted).] *Eliason*, slip op p 9.

Accordingly, on remand for resentencing, the trial court shall determine the appropriate sentence.

We affirm defendant's convictions and sentences except for his sentence for first-degree murder. We remand the matter to the trial court in accord with the above cited case law for resentencing solely on defendant's first-degree murder conviction. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ Deborah A. Servitto